Patent Application No. 09/766,811

REMARKS

This Amendment is in response to the Office Action dated August 16, 2004. In the Office Action, claim 11 was objected to and claims 1-12 were rejected under 35 USC §103. By this Amendment, claim 11 is amended and claims 13-17 are added. Currently pending claims 1-17 are believed allowable, with claims 1 and 6 being independent claims.

CHANGE OF CUSTOMER NUMBER:

The Applicant calls to the Examiner's attention the Associate Power of Attorney and Change of Customer Number documents filed on May 26, 2004, copies of which are enclosed herewith. Kindly update the present Application's records to reflect the new Customer Number indicated in the filing.

CLAIM OBJECTIONS:

Claims 11 was objected to as containing the extraneous word "can" in the claim. By this Amendment, this word is removed. Amendment to claim 11 is made to correct a typographical error and does introduce new matter. Furthermore, the correction is not made to overcome any prior art references or for reasons of patentability.

CLAIM REJECTIONS UNDER 35 USC §103:

Claim 1:

Claim 1 was rejected under 35 USC §103 as obvious over U.S. Patent No. 5,845,090 to Collins, III et al. (hereinafter "Collins") in view of U.S. Patent No. 6,505,228 to Schoening et al. (hereinafter "Schoening"), SmartUpdate, "SmartUpdate Developer's Guide", http://developer.netscape.com/docs/manuals/communicator/jarman/install.htm (hereinafter "SmartUpdate"), and U.S. Patent No. 6,389,589 to Mishra et al. (hereinafter "Mishra"). Office Action, paragraph 4.

A *prima facie* case for obviousness can only be made if the combined prior art reference documents teach or suggest all the claim limitations. MPEP 2143. "Prior art disclosures on the Internet or on an on-line database are considered to be publicly available as of the

- 6 -

date the item was publicly posted. If the publication does not include
a publication date (or retrieval date), it cannot be relied upon as
prior art under 35 U.S.C. 102(a) or (b) . . . ." MPEP 2128.

Claim 1 of the pending Application recites, in part, a software
deployment tool having "means, responsive to check failure of any class
instance, for executing a second method on each of said at least one
class instances in a second mode, the second mode being less preferable
than the first mode." Application, claim 1.

In the Office Action, the Examiner states that neither Collins,
Schoening nor Mishra teach or suggest a means for executing a second
method on at least one class instance in a second mode, responsive to a
check failure, with the second mode being less preferable than a first
mode, as claimed in claim 1. The Examiner, however, alleges that such
a teaching can be found in SmartUpdate.

In response, the Applicant respectfully submits that no evidence
is provided in the Office Action that the SmartUpdate document is prior
art with respect to the present Application. Although the Office
Action alludes to a prior date in 1999, SmartUpdate does not contain
any publication date or other statement providing the Applicant with an
opportunity to verify that it is a publication that was publicly
available before the filing date of the present Application.

The Applicant formally requests that the Examiner provide evidence
that the SmartUpdate document was publicly available before the filing
date of the present Application, as set forth in MPEP 2128. For at
least this reason, the Applicant respectfully submits that a *prima
facie* case of obviousness has not been established for claim 1. The
Applicant further petitions withdrawal of the rejection of claim 1, as
well as the Final Rejection of the Application. In addition, the
Applicant believes that claim 1 is allowable and such allowance is
earnestly solicited.

- 7 -

Patent Application No. 09/766,811

Claims 2-5:

Claims 2-5 are dependent on and further limit claim 1. Since claim 1 is believed allowable, claims 2-5 are also believed allowable for at least the same reasons as claim 1.

Claim 6:

Claim 6 was rejected under 35 USC §103 as obvious over Collins in view of Mishra. Office Action, paragraph 5.

A *prima facie* case for obviousness can only be made if the combined prior art reference documents teach or suggest all the claim limitations. MPEP 2143.

Claim 6 recites a system for deploying software comprising, in part, a software package having at least one file and including "a hierarchical structure of leaf and branch nodes capable of being traversed from parent to child in a top-down manner." Application, claim 6.

In rejecting claim 6, the Examiner states that Collins does not disclose a hierarchical structure of leaf and branch nodes capable of being traversed from parent to child in a top-down manner included in a software package. Office Action, paragraph 5. Nevertheless, the Examiner argues that Mishra discloses the above limitations of claim 6.

Contrary to the Examiner's assertions, Mishra does not teach or suggest a software package including a hierarchical structure of leaf and branch nodes capable of being traversed from parent to child in a top-down manner, as claimed in claim 6. Mishra makes mention to hierarchal organization, but this teaching refers to a hierarchy of domains and organizational units in which objects are placed, not software packages themselves. Mishra, col. 4, lines 41-54 and lines 53-57. Therefore, the Applicant respectfully submits the hierarchical structure referred to by Mishra is completely different to the hierarchical structure of a software package recited in claim 6 of the present Application.

In the Office Action, the Examiner cites the following passages of Mishra as apparently teaching the claim limitations cited above: Table

- 8 -

2, col. 7; Figs. 3 and 5B; and the entire text from col. 6, line 25 to col. 11, line 30. Office Action, paragraph 4, page 5. The Applicant respectfully disagrees with such a conclusion.

Table 2 at col. 7 describes a package container object and contains no teaching or suggestion of hierarchical structure of leaf and branch nodes. Mishra, col. 6, lines 66-67 and Table 2, col. 7.

Likewise, Fig. 3 of Mishra does not show a software package having at least one file and including a hierarchical structure of leaf and branch nodes. Fig. 3 illustrates various containers under a "class store," and a class store, unlike a software package stores the state of deployment of managed application, not package files. Mishra, col. 5, lines 9-11 and col. 6, line 14. Fig. 5B and the entire text from col. 6, line 25 to col. 11, line 30 appear entirely off topic and make no mention or suggestion of a software package having at least one file and including a hierarchical structure of leaf and branch nodes.

For at least these reasons, the Applicant respectfully submits that that a *prima facie* case of obviousness has not been established for claim 1. Additionally, the Applicant submits that claim 6 is allowable over the cited art and earnestly solicits allowance of claim 6.

Claim 8:

Claim 8 was rejected under 35 USC §103 as obvious over Collins in view of Mishra. Office Action, paragraph 5, page 7.

While "official notice" may be relied on, these circumstances should be rare when an application is under final rejection. MPEP 2144.03. "Official notice unsupported by documentary evidence should only be taken by the examiner where the facts asserted to be well-known, or to be common knowledge in the art are capable of instant and unquestionable demonstration as being well-known." *Id.* "It would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known." *Id.*

- 9 -

Patent Application No. 09/766,811

Claim 8 recites, "The system of claim 6, further comprising a package editor configured to graphically define the software package." Application, claim 8.

In rejecting claim 8, the Examiner states, "Official notice is taken that a build time of <u>any software package</u>, the use of an editing graphical interface enabling the authoring authorities responsible for packaging the software to be built to view and modify the list of items to put together was a known concept at the time the invention was made." Office Action, paragraph 5, page 8 (emphasis added). In the present Application, claim 8 refers by reference to a software package including a hierarchical structure of leaf and branch nodes capable of being traversed from parent to child in a top-down manner as recited in claim 6. The Applicant believes that such a software package is novel in its own right, and therefore cannot agree with the official notice assertions made by the Examiner.

Thus, the Applicant respectfully submits that such official notice is improper since the allegations made by the Examiner as not well-known or common knowledge in the art capable of instant and unquestionable demonstration. The Applicant respectfully demands authority be produced supporting the official notice in accordance with MPEP 2144.03(C).

For at least this reason, the Applicant respectfully submits that a *prima facie* case of obviousness has not been established for claim 8. Furthermore, the Applicant petitions withdrawal of the rejection of claim 8, as well as the Final Rejection of the Application. In addition, the Applicant believes that claim 8 is allowable and such allowance is earnestly solicited.

Claim 9:

Claim 9 was rejected under 35 USC §103 as obvious over Collins in view of Mishra. Office Action, paragraph 5, page 7. A *prima facie* case for obviousness can only be made if the combined prior art reference documents teach or suggest all the claim limitations. MPEP 2143.

- 10 -

Claim 9 recites, "The system of claim 6, wherein the hierarchical structure of the software package is serialized." Application, claim 9.

In rejecting claim 9, the Examiner states, "Collins does not explicitly disclose serialized package, but this serializing of data being transmitted over the transmission medium was a known concept at the time the invention was made; and as such, Collins' package is considered being transmitted in serialized form has been disclosed by stream (e.g. Fig. 6)." Office Action, paragraph 5, page 8. It is respectfully submitted that Fig. 6 of Collins, or its description, does not teach or suggest serializing the hierarchical structure of a software package.

If the Examiner is relying on official notice in support of the rejection of claim 9, the Applicant respectfully submits that such official notice is improper since the allegations made by the Examiner as not well-known or common knowledge in the art capable of instant and unquestionable demonstration. The Applicant respectfully demands authority be produced supporting the official notice in accordance with MPEP 2144.03(C).

For at least this reason, the Applicant respectfully submits that a *prima facie* case of obviousness has not been established for claim 9. Furthermore, the Applicant petitions withdrawal of the rejection of claim 9, as well as the Final Rejection of the Application. In addition, the Applicant believes that claim 9 is allowable and such allowance is earnestly solicited.

Claims 10 and 11:

Claims 10 and 11 were rejected under 35 USC §103 as obvious over Collins in view of Mishra. Office Action, paragraph 5, page 7. A *prima facie* case for obviousness can only be made if the combined prior art reference documents teach or suggest all the claim limitations. MPEP 2143.

Claim 10 recites, in part, "the software package is represented by a sequence of stanzas, with each stanza representing an action." Application, claim 10. Claim 11 is dependent on claim 10 and recites,

- 11 -

"wherein the stanzas are nested such that stanzas containing other stanzas represent a container action." Application, claim 11.

In rejecting claims 9 and 10, the Examiner argues that although Collins does not disclose a package organized in stanzas and that each stanza represents a container action, Mishra "has evoked the concepts of stanzas." Office Action, paragraph 5, page 9. The Applicant respectfully submits that "evoking concepts" is not the test for obviousness. Accordingly, the Applicant respectfully submits that for at least this reason, a *prima facie* case of obviousness has not been established for claims 10 and 11. Furthermore, the Applicant petitions withdrawal of the rejections of claims 10 and 11, as well as the Final Rejection of the Application. In addition, the Applicant believes that claims 10 and 11 are allowable and such allowance is earnestly solicited.

Claims 7-12:

Claims 7-12 are dependent on and further limit claim 6. Since claim 6 is believed allowable, claims 7-12 are also believed allowable for at least the same reasons as claim 6.

Claims 13-17:

New dependent claims 13-17 are added by this Amendment. No new matter is believed to be introduced by claims 13-17 since these claim contains essentially identical limitations already present in claims 1-5. Furthermore, entry of claims 13-17 is permitted since, as detailed above, Final Rejection of claims 1-12 is premature.

CONCLUSION

In view of the forgoing remarks, it is respectfully submitted that this case is now in condition for allowance and such action is respectfully requested. If any points remain at issue that the Examiner feels could best be resolved by a telephone interview, the Examiner is urged to contact the attorney below.

No fee is believed due with this Amendment, however, should a fee be required please charge Deposit Account 50-0510. Should any

- 12 -

Patent Application No. 09/766,811

extensions of time be required, please consider this a petition thereof
and charge Deposit Account 50-0510 the required fee.

Respectfully submitted,

Dated: October 18, 2004

Ido Tuchman, Reg. No. 45,924
69-60 108th Street, Suite 503
Forest Hills, NY 11375
Telephone (718) 544-1110
Facsimile (718) 544-8588

- 13 -